New York. Then, as he is not a guardian in the foreign jurisdiction, he cannot exercise an *animus manendi* for the infant therein. And the infant cannot by himself acquire a domicile of choice in the foreign jurisdiction, because he is under the same disability there as at home. Therefore, if the infant does in fact take up a residence in a new state, his domicile is still in the old.

The case of an insane person is somewhat different. His guardian's powers are restricted in the same way, and consent to a home outside the state does not affect the ward's domicile. But a person over whom a guardian has been appointed for insanity, although not yet adjudged insane, is not under a disability in a foreign state.[8] If, in fact, he has enough intelligence left to have an intention, he can, by moving into the foreign state, acquire a domicile therein.[9] This distinction seems to have been overlooked in a recent case, where an insane ward was allowed to acquire a domicile in a foreign state on the ground that his guardian had consented. *In re Kingsley*, 160 Fed. 275 (Dist. Ct., Vt.). As already pointed out, the guardian's consent is immaterial, since his powers do not extend to the foreign jurisdiction. The real question is whether, as a matter of fact, the incompetent has enough mind left to form an *animus manendi*.[10]

THE CONSTITUTIONAL QUESTION INVOLVED IN THE EXCLUSION OF ALIENS BY THE EXECUTIVE. — Under the Immigration Act of 1903 which denies admission to the United States to aliens who are "afflicted with a loathsome or with a dangerous contagious disease," Congress has enacted that a board of immigration officers shall decide all questions in dispute as to the rights of any alien to enter the United States and that its decision shall be subject to review by the Secretary of Commerce and Labor.[1] A recent case has construed the act to apply to aliens domiciled in the United States returning after a temporary absence abroad. *In the Matter of Hermine Crawford, alias Marie Mayvis*, 40 N. Y. L. J. 419 (Dist. Ct., N. Y., Oct. 28, 1908). The decision is in conflict with the weight of previous authority.[2] It is unquestioned that Congress has power to expel from the United States alien residents as well as immigrants;[3] but in the absence of a clearly expressed intention of Congress to exclude the former the weight of authority seems sound in view of the construction of a former act.[4]

The difficulty in these cases, however, is not in construing the act, but in deciding what branch of the government is entitled to determine the status of the person whose right to enter or remain is in question — whether he is an alien resident, an immigrant, or a citizen. In view of the decisions of the Supreme Court in cases arising under the Chinese Exclusion Acts which hold that the finding of these facts as to citizenship by the executive officers

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[8] Talbot *v.* Chamberlain, 149 Mass. 57.

[9] Talbot *v.* Chamberlain, *supra*. See Concord *v.* Rumney, 45 N. H. 423; Urquhart *v.* Butterfield, 37 Ch. D. 357.

[10] Culver's Appeal, 48 Conn. 165.

[1] U. S. Comp. St. Supp. 1905, p. 274, § 25.

[2] Rogers *v.* U. S., 152 Fed. 346; U. S. *v.* Nokashima, 160 Fed. 842.

[3] Fong Yue Ting *v.* U. S., 149 U. S. 698; U. S. *v.* Turner, 194 U. S. 279.

[4] U. S. Comp. St. 1901, p. 1294; *In re* Panzara, 51 Fed. 275; *In re* Martorelli, 63 Fed. 437; *In re* Ota, 96 Fed. 487.

is conclusive,[5] a different result can hardly be looked for under the Immigration Act of 1903. To be sure, if it is granted that the person in question is a non-resident alien, the case is clear; since the power to exclude aliens is political in its nature and therefore is no part of the power vested by the Constitution in the courts.[6] But if it is disputed whether the person is in fact a non-resident alien, the decision of the executive officers should be reviewable by the courts upon a writ of *habeas corpus*. Upon the determination of this question depends the very jurisdiction of the ministerial officers, and it has always been held that the finding of facts upon which jurisdiction is based is reviewable by the courts irrespective of legislative sanction.[7] Under the rule laid down in the Chinese Exclusive Acts a citizen of the United States may be declared by a board of immigration officers to be a non-resident alien afflicted with a dangerous disease and on appeal for a judicial determination of his citizenship the best he can expect is to have his case considered by a higher executive officer whose decision, if adverse to his claim, results in his deportation from the country. The rights in question are too sacred to be decided in such a way. No citizen of the United States can be deported from the country except as a punishment for crime, and then only after a trial by jury. This constitutional right Congress cannot take away. It would therefore seem that the finding of facts upon which citizenship is based is a judicial question, and it is difficult to see how Congress through its appointed agents can determine the existence of facts upon which depends a constitutional right which Congress is powerless to disturb.

PUTATIVE MARRIAGE.— The status of legitimacy was granted more freely by the civil than the common law.[1] The civilians regarded as legitimate the issue of a marriage contracted when at least one of the parties believed the marriage to be lawful.[2] This doctrine of putative marriage formed the basis of an ingenious contention in a recent English case. *Re Stirling*, [1908] 2 Ch. 334. Two persons domiciled in Canada or Scotland were married in California after the woman's former husband had obtained in North Dakota a divorce invalid in Canada or Scotland. Their child, if legitimate, was entitled to succeed to property in Scotland, and his counsel contended that since his parents had married under a *bona fide* mistake as to Scottish law, that is, a mistake of fact, the doctrine of putative marriage applied. The court refused to decide whether that doctrine was law in Scotland or whether the parents were domiciled in Scotland or Canada, but held, following an earlier dictum,[3] that in any case the mistake as to the validity of the divorce would be a mistake of law, and hence the doctrine did not apply. In regard to the first point, the query whether the Scottish law recognizes putative marriages, there appear to be no modern decisions;[4] that they are so recognized was affirmed by the leading modern writer[4] on the subject, but his authority was impugned in the course of the argument in the principal case. Certainly the doctrine

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[5] U. S. *v.* Tee Toy, 198 U. S. 253.
[6] Fong Yue Ting *v.* U. S., *supra*. See 22 HARV. L. REV. 132.
[7] American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, 107–109.

[1] See 16 HARV. L. REV. 22 *et seq.*
[2] *Ibid.* 38.
[3] See Shaw *v.* Gould, L. R. 3 H. L. 55, *per* Lord Colonsay, p. 97.
[4] See Fraser, Parent and Child, 2 ed., 22 *et seq.*